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What Can We Learn from Amy Coney Barrett's First Opinion?

Blake Stocke*

A. Introduction

On March 4, 2020, Supreme Court Justice Amy Coney Barrett issued her first opinion for the Supreme Court in *United States Fish and Wildlife Services v. Sierra Club, Inc.*¹ In a 7–2 opinion, the Court shielded federal agencies from disclosing certain materials under an exception to the Freedom of Information Act (FOIA).² Justice Barrett's first opinion for the Court presents an opportunity both to analyze how the Supreme Court might look with Barrett in the fold, as well as to discuss how government transparency might be impacted.

B. Justice Barrett's Background

Amy Coney Barrett became the 103rd Associate Justice of the Supreme Court on October 27, 2020.³ Prior to her career as a judge, she taught law at the University of Notre Dame for fifteen years.⁴ Also, immediately after law school, she clerked for former Supreme Court Justice Antonin Scalia.⁵ In 2017, she was nominated by President Trump to the U.S. Court of Appeals for the Seventh Circuit and served there until her nomination to the Supreme Court last fall.⁶

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¹ No. 19-547, slip op. at 1 (Mar. 4, 2021); Adam Liptak, *Justice Amy Coney Barrett Issues Her First Majority Opinion*, N.Y. TIMES (Mar. 4, 2021), <https://www.nytimes.com/2021/03/04/us/amy-coney-barrett-supreme-court.html>.

² Ariane de Vogue, *Justice Amy Coney Barrett's first majority written opinion limits reach of FOIA*, CNN (Mar. 4, 2021), <https://www.cnn.com/2021/03/04/politics/barrett-foia-supreme-court/index.html>.

³ Press Release, Supreme Court of the United States (Mar. 6, 2021), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_10-26-20.

⁴ Robert Barnes, *In Amy Coney Barrett's first signed majority opinion, Supreme Court sides with government over environmentalists*, WASH. POST (Mar. 4, 2021), https://www.washingtonpost.com/politics/courts_law/amy-coney-barrett-supreme-court-epa-opinion/2021/03/04/b9008ce6-7cf5-11eb-a976-c028a4215c78_story.html.

⁵ *Id.*

⁶ *Id.*

Her nomination to the Supreme Court came quickly, and with its share of controversy. Justice Ruth Bader Ginsburg died on September 18, just months before the presidential election.⁷ Thereafter, Barrett's nomination was greatly accelerated so that President Trump could appoint her before the end of his term as president.⁸ Her appointment moved the Supreme Court further to the right, as her conservative views replaced the more liberal views of her predecessor Ginsburg.⁹ Specifically, she shares with her former mentor Justice Scalia a belief in originalism, which advocates for an interpretation of the words of the Constitution as the authors had intended when they wrote it.¹⁰

Some Democrats expressed concern that she could not be impartial due to her religious convictions, given her devout Catholicism.¹¹ They pointed to quotes from Barrett such as "a legal career is but a means to an end . . . and that end is building the Kingdom of God" to highlight concern that she would struggle with impartiality.¹² She insisted, however, that she would follow Supreme Court precedent without fail, and would honor decisions such as *Roe v. Wade* as binding.¹³

C. The Freedom of Information Act

The Freedom of Information Act, passed in 1967, provides the public with the right to request access to records from federal agencies.¹⁴ Any federal agency must publish in the Federal Register information about its place of organization, its general course and methodology, its rules of procedure, and the places where the public may obtain information or make requests.¹⁵

⁷ Lawrence Hurley, *Barrett authors first U.S. Supreme Court ruling, a loss for environmentalists*, REUTERS (Mar. 4, 2021), <https://www.reuters.com/article/us-usa-court-barrett/barrett-authors-first-u-s-supreme-court-ruling-a-loss-for-environmentalists-idUSKBN2AW2AP>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Barnes, *supra* note 4.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *What is FOIA?*, U.S. DEPT. JUST., <https://www.foia.gov/about.html> (last visited Mar. 8, 2021).

¹⁵ 5 U.S.C. § 552(a)(1) (2018).

The agencies must also make available final opinions in the adjudication of cases, statements of policy and interpretations adopted by the agency, administrative staff manuals, and copies of all records that have been released to any person.¹⁶

There are, however, nine exemptions to the FOIA, where the government is not required to disclose information.¹⁷ These exemptions exist to protect interests like personal privacy, national security, and law enforcement.¹⁸ Of interest in *Sierra Club* was the fifth exemption,¹⁹ which excludes inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with that agency.²⁰

D. Outcome and Impact of the Case

Sierra Club asks whether the fifth exemption to the FOIA, known as the “deliberate process privilege”, protects in-house drafts that would prove to be an agency’s “last word” about a policy, despite not being a document that embodies or explains the official policy that the agency adopts.²¹ In the case, the Environmental Protection Agency (EPA) consulted with the U.S. Fish and Wildlife Service and the National Marine Fisheries Services (together, the “Services”) to help determine whether an EPA proposal would adversely affect protected aquatic wildlife.²² Specifically, the EPA wanted to determine how its proposal on cooling water intake structures would affect marine wildlife in the area.²³

After deliberation, the Services both found that the proposal would likely jeopardize certain aquatic species and identified alternative methods.²⁴ Though they both generated drafts with these conclusions, they did not

¹⁶ 5 U.S.C. § 552(a)(2).

¹⁷ *What is FOIA?*, *supra* note 14.

¹⁸ *Id.*

¹⁹ *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, No. 19–547, slip op. at 5 (U.S. Mar. 4, 2021).

²⁰ 5 U.S.C. § 552(b)(5).

²¹ *Sierra Club*, slip op. at 1.

²² *Id.* at 2.

²³ *Id.* at 1–2.

²⁴ *Id.* at 3.

approve these drafts, nor did they send them to the EPA.²⁵ Rather, deliberations continued, and the EPA would eventually send the Services a significantly different proposal, which the Services accepted as unlikely to harm protected species.²⁶

Sierra Club, an environmental organization, would later sue the Services, and request the Services' drafts that were not sent to the EPA.²⁷ In her first opinion, Justice Barrett held that these documents met the deliberate process privilege.²⁸ She noted that "a document is not final solely because nothing else follows it", and that a draft is, by definition, a preliminary version of a piece of writing.²⁹ Thus, despite evidence that the drafts may have convinced the EPA to revise its proposal,³⁰ they "died on the vine".³¹ Therefore, these reports did not have to be made publicly available, as they fell under the deliberate process privilege.³²

In dissent, Justice Breyer, who was joined by Justice Sotomayor, stated that whether a document is final or deliberative depends upon its function in the agency's decision-making process.³³ In this case, Justice Breyer notes that both a "final" opinion or the type of draft opinion identified here serve the same function in the process – that is, encouraging the EPA to drop or change its proposal.³⁴ Thus, Justices Breyer and Sotomayor would allow Sierra Club to access these records, provided they were not protected in another manner.³⁵

E. Conclusion

Had it not been the first written opinion of Justice Barrett, it is likely that this case would have been resolved with little media attention. However,

²⁵ *Id.*

²⁶ *Sierra Club*, slip op. at 3–4 (Mar. 4, 2021).

²⁷ *Id.* at 4.

²⁸ *Id.* at 11.

²⁹ *Id.* at 7.

³⁰ *Id.* at 8.

³¹ *Sierra Club*, slip op. at 10 (Mar. 4, 2021).

³² *Id.*

³³ *Id.* at 1 (Breyer, J., dissenting).

³⁴ *Id.* at 2–3.

³⁵ *Id.* at 6.

there are important takeaways from the case. First, by requiring documents to be final to meet the deliberate process privilege, the case effectively limits the power of the FOIA to require public disclosure.³⁶ This represents a loss to those who would like to see more transparency from the federal government.³⁷

Second, *Sierra Club* confirms that Justice Barrett will maintain her conservative leanings on the Supreme Court. In the case, Justice Barrett sided with the other members of the Supreme Court typically classified as conservatives, along with Elena Kagan. Her opinion, moreover, reflects an originalist view like that of Justice Scalia. She makes a formal interpretation of the FOIA statute, saying that the records in *Sierra Club* met the exception because they were identified and classified as draft opinions, with a final opinion to come later.³⁸ Thus, they qualify as private “memorandums or letters”.³⁹ Though Barrett does concede that the privilege does not allow agencies to falsely label final decisions as drafts to prevent public disclosure, she did rule that these documents were privileged because they are “pre-decisional and deliberative.”⁴⁰ This is in contrast with Justice Breyer’s viewpoint of looking at the context in which the drafts were created, and the specific role they served, in order to determine whether they qualify.

Last, the case illustrates the conservative lean of the current Supreme Court. In a slight break from tradition, Justice Barrett’s first written opinion was not a unanimous one, though other Justices such as Justice Kagan and former Justice Ginsburg also wrote the majority opinion on a split decision their first time around.⁴¹ However, Justice Barrett was joined by all the conservatives of the court, followed by just one Justice, Elena Kagan, who is traditionally thought of as liberally minded. With just one liberal Justice siding with conservatives, the result in this case was 7-2. If the conservative

³⁶ de Vogue, *supra* note 2.

³⁷ *Id.*

³⁸ *Sierra Club*, slip op. at 3.

³⁹ 5 U.S.C. 552 § (b)(5) (2018).

⁴⁰ *Sierra Club*, slip op. at 10–11.

⁴¹ Jessica Gresko, *Supreme Court Justice Amy Coney Barrett delivers 1st opinion*, ASSOCIATED PRESS (Mar. 4, 2021), <https://apnews.com/article/amy-coney-barrett-1st-opinion-freedom-of-information-act-a94a47880f87d77391298553c44de702>.

judges continue to operate in lockstep with each other, Justices Kagan, Breyer, and Sotomayor will be on the dissenting side of cases often.

Edited by Ben Davisson